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Supreme Court of the United States

OCTOBER TERM, 1933.

No. 126.

PIGEON RIVER IMPROVEMENT, SLIDE & BOOM COMPANY,
Appellant,

vs.

CHARLES W. COX, LIMITED,
Appellee.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

APPELLANT'S BRIEF.

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vs.

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APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE EIGHTH CIRCUIT.

APPELLANT'S BRIEF.

STATEMENT OF CASE.

The decision below is reported at 63 Fed. (2d) 567.

Appellant, in 1898, was by Minnesota statutes and its incorporation thereunder and by an Act of Congress of 1901, authorized to construct and operate dams and sluiceways and to otherwise improve the channel on the American side of the International Boundary in Pigeon River, a non-navigable boundary stream some thirty miles long, flowing into Lake Superior at the northeast corner of Minnesota, so as to make possible the driving of logs therein, and to collect reasonable and uniform tolls or charges on timber

driven down the river for the use of such facilities provided and maintained by it.

An affiliated company was at the same time chartered and similarly authorized by the Province of Ontario to operate on the Canadian side of the boundary. The two companies, pursuant to agreement between them, then improved the river and have since maintained their improvements, each on its own side of the boundary, so that, although in its natural state the river was incapable of use for log driving, it has ever since been capable of such use.

Appellee, a Canadian citizen, during the year 1928 to 1930, drove and floated considerable quantities of loose pulpwood and railway ties of Canadian origin down the river, making use of appellant's improvements on the American side of the boundary in so doing (R. 7). It refused to pay appellant's charges therefor. This action for their collection, brought in the Minnesota State District Court, followed.

The action was duly removed to the United States District Court for Minnesota (R. 1-5).

An amended complaint was then filed (R. 5). Appellee demurred on the ground that it did not state facts sufficient to constitute a cause of action (R. 29). The demurrer was sustained, without leave to amend, and a judgment of dismissal was entered (R. 29-30).

Appellant appealed to the Circuit Court of Appeals, Eighth Circuit, who affirmed.

The case is here on appeal. A jurisdictional statement was filed and jurisdiction has been noted.

STATEMENT OF FACTS.

The allegations of the complaint must here be taken as true and capable of proof. These, together with geographical and historical facts, the state statute and the Federal statute authorizing appellant's acts follow.

Appellant's Authority Under Minnesota Laws.

Par. 2633-4, Title I, chap. 34, General Statutes, Minnesota, 1894, enacted as chap. 221, General Laws of Minnesota, 1889, authorizes appellant's acts (R. 5-6). The statute was amended by chap. 89, General Laws of Minnesota for 1905 and appears as Par. 7550-2, *Mason's Minnesota Statutes, 1927*. The full text of the original act is printed in an appendix to this brief. So far as here pertinent, it provides:

1. The company may "take prior possession of any stream by the construction of works in aid of driving logs thereon and may improve such stream by clearing and straightening channels, closing sloughs and by building sluiceways, booms, side, rolling, sluicing and flooding dams. * * *"

2. Any such company which "shall so improve a stream, keep it in repair and operate its works as to render the driving of logs therein reasonably practicable, may collect reasonable and uniform tolls upon all logs, lumber and timber, driven, sluiced or floated thereon."

3. "Any such company organized for the improvement of any stream forming either wholly or in part the boundary line between Minnesota and an adjoining state or country, may unite with any similar corporation formed under the laws of such adjoining state or country for the better accomplishment of the purposes of its organization, either by

ownership of stock therein, consolidation therewith, or otherwise."

4. "Necessary rights may be acquired by purchase or eminent domain."

5. "Such company is a public service company to the extent that it must serve the public equally and reasonably and for reasonable compensation."

Appellant was incorporated on September 3, 1898, as a Minnesota corporation for the express purpose of exercising the franchise conferred by this statute on the portion of Pigeon River lying on the American side of the boundary. Its certificate of incorporation authorizes it so to do (R. 5-6).

Pigeon River is a small stream having its source in some small boundary lakes and flowing in a southeasterly direction a distance of about thirty miles along and forming the boundary between the United States and Canada. It discharges into Lake Superior. The boundary is approximately in midstream (R. 6).

Detailed sectional maps of the river from Lake Superior to South Fowl Lake, prepared under the direction of the International Joint Boundary Commission, are, by reference, made a part of the amended complaint as Exhibits A to H (R. 5, 11-25). A detailed map showing the entire boundary and boundary waters from Lake Superior to Lake of the Woods and the northwest angle of Minnesota is pleaded as Exhibit I (R. 27). Smaller reproductions of these maps are incorporated in the record, but unfortunately because of difficulty of reproduction on a small scale, they are not as clear and understandable as the original exhibits themselves.

Before appellant's incorporation and the improvements of the river by the two companies, it was incapable of use for

the driving, handling and floating of logs, pulpwood and timber of other sorts thereon (R. 6).

No other company had then been organized for the improvement of the river; hence, appellant "took prior possession" of the American side of the river pursuant to state statutes, and thus became vested with the franchise and privileges thereby conferred (R. 6).

Appellant's Authority Under Federal Law.

The boundaries of the Pigeon River Indian Reservation touching the river are shown on the maps. The Reservation extends along the Minnesota side of the river from a point shown on Exhibit F (R. 21) downstream to a point shown on Exhibit B (R. 13), about fifteen miles by the river.

Act of Congress, March 3, 1901 (31 Stat. 1455), the full text of which is printed in the appendix, authorized appellant to enter upon this Reservation and improve the river at its cascades for the purpose of making it navigable for floating logs and to construct sluice dams, wing dams, bulkheads, spill dams and other works necessary for that purpose, upon condition that after being so improved the river should be open to the free passage of timber cut from the Reservation and to the passage of all other timber for a reasonable charge therefor.

Improvement of River on Canadian Side.

At the time of appellant's incorporation, Arrow River and Tributaries Boom & Slide Company was chartered by the Province of Ontario and vested with similar powers on the Canadian side of the river (R. 7).

The two companies, acting together by agreement, constructed their works and made their improvements, each

on its own side of the boundary, so that those of each constituted complements of those of the other. They have each ever since kept their respective improvements in repair and so jointly operated their works on the river as to render the driving of logs therein reasonably practicable. Without these improvements the river in its natural state was incapable of such use (R. 7).

Nature and Location of Improvements.

The principal features of the improvements, jointly constructed as aforesaid, and their location appear on the maps pleaded by exhibit (R. 7). A flooding dam at the outlet of South Fowl Lake is shown on Exhibit H (R. 25). The Cascades dam and sluiceway appears on Exhibit E (R. 19). A dam and sluiceway at High Falls is shown on Exhibit A (R. 11). The balance of the improvements consist of removal of rock at various points so as to clear the channel, straightening the channel itself, closing off sloughs from the main channel and the construction of various side and rolling dams to prevent timber, as it passes certain points, from becoming hung up or jammed (R. 7). Some of these latter dams are also shown on the maps.

Of these improvements, only the flooding dam at the outlet of South Fowl Lake (R. 25) is above Fort Charlotte (R. 19), hereinafter referred to.

The greater portion of the improvements lie in the river adjacent to the Indian Reservation. Those which do not are the South Fowl Dam (R. 25), the dam and sluiceway at High Falls (R. 11) and miscellaneous improvements and wing and rolling dams extending along about five and one-half miles of river between High Falls and the southeasterly boundary of the Reservation (R. 11, 13).

Basis of Decision Below.

Another action was instituted in the Federal District Court by one Clark who alleged ownership of Canadian timber which he intended to drive down the river and sought an injunction to restrain this appellant from interfering with his drives or collecting tolls therefor. The District Court, on defendant's motion, dismissed his bill. On appeal, the lower court's decision was reversed and the suit remanded for trial.

Clark vs. Pigeon, etc., Co., 52 Fed. (2d) 550.

That action was never brought on for trial and a final judgment has not been entered.

In the Clark case, the Circuit Court of Appeals held (in the language of Judge Kenyon in the case below): "(1) The movement of Canadian pulpwood on Pigeon River was foreign commerce over which the state of Minnesota could exercise no control, and (2) that the collection of tolls on this river under grant of a franchise by the state of Minnesota would be a violation of the Webster-Ashburton Treaty." The question of navigability of the river was held immaterial.

The Treaty referred to provides:

> "That all the water-communications and all the usual portages along the line from Lake Superior to the Lake of the Woods and also Grand Portage, from the Shore of Lake Superior to the Pigeon River, *as now actually used,* shall be *free and open* to the use of the citizens and subjects of both countries."
>
> *Webster-Ashburton Treaty,* 1842, 8 Stat. 572.

When the Clark decision was rendered, an action similar to the instant one was pending in the Ontario courts. The

Arrow River Company there sued a Canadian citizen to collect tolls for the use of the Canadian half of these same improvements in a like drive of timber products. The defendant there likewise set up the Treaty. That action had then reached the Supreme Court of Ontario resulting in a decision (*Arrow River and Tributaries Slide & Boom Co., Ltd.*, 39 Ont. Weekly Notes 454, 66 Ont. Law Reports 577), which construed the Treaty provision as prohibiting the Arrow River Company's improvements and the collection of tolls for their use.

The Clark decision, when rendered, was therefore in harmony with that of the Canadian courts.

The Arrow River Company case was, however, then on appeal to the Supreme Court of the Dominion of Canada; who, on March 15, 1932, after the decision in the Clark case but before the decision below in this case, by unanimous decision, reversed the Provincial Supreme Court and held, the five justices not, however, concurring in the reasons for reversal, that the Treaty did not forbid the construction of the Arrow Company's improvements in the river nor its collection of tolls for their use.

> *Arrow River and Tributaries Slide & Boom Co., Ltd., vs. Pigeon Timber Co., Ltd.*, 1932 Canadian Supreme Court Reports 495.

That decision is final, no appeal having been taken to the Privy Council at London.

The situation is therefore unique. Obviously, the Canadian company cannot maintain its part of the works, though permitted to do so under Canadian law, if the Minnesota company is prevented from maintaining its portion on the American side.

Appellee is here asserting a right to freedom from tolls

which is denied him on his own side of the boundary. Similarly, an American citizen, making use of the improvements on the Canadian side, must respond by payment of tolls for their use.

This situation prompted the court below to say:

> "If the question were now an original one we should feel that in view of the conflicting decisions as to the construction of this treaty it would be proper to certify the questions to the Supreme Court for advice, but as we have in the Clark case expressed our opinion as to how these provisions should be construed we would not we think be warranted in asking the advice of the Supreme Court in relation thereto, unless satisfied at least that our former decision was erroneous. We are not so satisfied."

Uniformity of decision by the courts of both countries is always desirable in matters concerning the rights of citizens of each on boundary waters. It is particularly desirable here, for if the decision below is adhered to not only is this appellant deprived of its investment and rights in this river, but the Ontario company suffers similarly. Unless appellant can continue the maintenance and operation of its works, neither can the Arrow River company. A dam running from the Canadian s. cannot serve any purpose if it must be chopped off at midstream.

ASSIGNMENTS OF ERROR.

Appellant claims error on the part of the lower court in the following particulars:

1. In refusing to reverse the judgment of the United States District Court for the District of Minnesota, Fifth Division.

2. In holding that section 8 of Article I of the Constitution of the United States prevents appellant from collecting reasonable and uniform tolls upon logs and timber driven, sluiced and floated by appellee upon the portion of Pigeon River within the boundaries of the state of Minnesota for the use by appellees in such operation of appellant's works, constructed, repaired, maintained and operated by it within the boundaries of the state of Minnesota in aid of driving logs thereon, pursuant to permission conferred by appellant's charter from the state of Minnesota pursuant to chapter 221, General Laws of Minnesota for the year 1889, as amended by chapter 89, General Laws of Minnesota for the year 1905.

3. In holding that Article II of the Webster-Ashburton Treaty of August 22, 1842, 8 United Statutes at Large 572, prevents appellant from collecting reasonable and uniform tolls upon logs and timber driven, sluiced and floated by appellee upon the portion of Pigeon River within the boundaries of the state of Minnesota for the use by appellee in such operation of appellant's works constructed, repaired, maintained and operated by it within the boundaries of the state of Minnesota in aid of driving logs thereon pursuant to permission conferred by appellant's charter from the state of Minnesota pursuant to chapter 221, General Laws of Minnesota for the year 1889, as amended by chapter 89, General Laws of Minnesota for the year 1905.

4. In refusing to hold that that portion of Article II of the Webster-Ashburton Treaty of August 22, 1842, 8 United States Statutes at Large 572, reading: "That all the water communications and all the usual portages along the line from Lake Superior to the Lake of the Woods and also Grand Portage, from the Shore of Lake Superior to the Pigeon River, as now actually used, shall be free and open to the

use of the citizens and subjects of both countries," does not apply to the portions of Pigeon River lying between South Fowl Lake and the mouth of Pigeon River where appellant's works in aid of driving logs thereon are situate.

5. In refusing to hold that that portion of Article II of the Webster-Ashburton Treaty of August 22, 1842, 8 United States Statutes at Large 572, reading: "That all the water communications and all the usual portages along the line from Lake Superior to the Lake of the Woods and also Grand Portage, from the Shore of Lake Superior to the Pigeon River, as now actually used, shall be free and open to the use of the citizens and subjects of both countries," does not apply to the portions of Pigeon River between Fort Charlotte and the mouth of Pigeon River where appellant's works in aid of driving logs thereon are situate.

6. In holding that the words "free and open," as used in Article II of the Webster-Ashburton Treaty of August 22, 1842, 8 United States Statutes at Large 572, apply to and forbid the collection of reasonable and uniform tolls upon logs and timber driven, sluiced and floating upon Pigeon River for the use by appellee in such operation of works constructed, repaired, maintained and operated by appellant in aid of driving logs in the portion of Pigeon River within the boundaries of the state of Minnesota, under permission conferred by its charter from the state of Minnesota, pursuant to chapter 221, General Laws of Minnesota for the year 1889, as amended by chapter 89, General Laws of Minnesota for the year 1905.

7. In holding that the movement by a Canadian citizen of logs and timber on the portion of Pigeon River within the boundaries of the state of Minnesota is foreign commerce within the meaning of section 8 of Article I of the Constitu-

tion of the United States, over which the state of Minnesota cannot exercise control to the extent of chartering appellant, pursuant to chapter 221, General Laws of Minnesota for the year 1889, as amended by chapter 89, General Laws of Minnesota for the year 1905, to construct, repair, maintain and operate works in aid of driving logs in the portion of Pigeon River within the boundaries of the state of Minnesota, and to collect reasonable and uniform tolls thereon for the use in such operation of such works.

APPELLANT'S POINTS.

In support of the assignments appellant makes the following points:

I. The Pigeon River is a non-navigable water of the United States, or, at any rate, must be so treated on this appeal. (Assignments 1, 2, 7.)

II. The boundary and territorial sovereignty of the state of Minnesota extends to the International Boundary at mid-stream in the river; hence, the state had power to authorize appellant to make improvements therein and collect tolls therefor. (Assignments 1, 2, 3, 6, 7.)

III. The maintenance of appellant's work and the collection of reasonable charges for their use is authorized by act of Congress. (Assignments 1, 2, 3, 7.)

IV. Appellant does not interfere with nor burden foreign commerce. (Assignments 1, 2, 7.)

V. The portions of Pigeon River in which appellant's improvements are located were not "water communications" within the meaning of the Treaty; they had never been "actually used" as such; hence, the Treaty does not inhibit

appellant's improvements and collection of tolls. (Assignments 1, 3, 4, 5.)

VI. The words "free and open" as used in the Treaty do not imply freedom from tolls or charges for the use of appellant's improvements. (Assignments 1, 3, 6.)

VII. If the Treaty forbids appellant's works and collection of tolls, it is superseded by the act of Congress giving appellant such rights. (Assignments 1, 3.)

VIII. The use of Pigeon River is now controlled by the Root-Bryce Treaty of 1909 which impliedly repeals the Webster-Ashburton Treaty. In so far as it may apply to Pigeon River this later Treaty permits appellant's acts alleged in the complaint. (Assignments 1, 3.)

We will argue these points in the order stated.

ARGUMENT.

I.

PIGEON RIVER IS A NON-NAVIGABLE WATER OF THE UNITED STATES

For the purposes of this appeal, the Court must assume the non-navigability of the river within the Federal rule. The Clark case failed to determine this question. The decision there turned in part on the right of appellant Clark to try that question as a question of fact in the lower court. This was not done. No further proceedings were had after that case was remanded.

Navigability Must Be Proved.

Navigability must be alleged and proved as a fact. It cannot be presumed. Only in the case of large and important rivers may the court take judicial notice of their navigable character.

Harrison vs. Fite, 148 Fed. 781 (C. C. A., 8th).
U. S. vs. Rio Grande, Etc., Co., 174 U. S. 690.
Clark vs. Pigeon River, Etc., Co., 52 Fed. (2d) 550 (C. C. A., 8th).

In *Harrison vs. Fite, supra,* the Court held:

"Courts take judicial notice of the navigable character of our important rivers and inland lakes—those that are so within our common knowledge—but there are many of such insignificant capacity and doubtful utility that the question, being one of fact, is to be determined by the evidence produced, and in such cases the burden of proof rests upon him who asserts the existence of the public servitude."

In the Rio Grande case, this Court held:

"It is reasonable that the courts take judicial notice that certain rivers are navigable and others not, for these are matters of general knowledge. But it is not so clear that it can fairly be said, in respect to a river known to be navigable, that it is or ought to be a matter of common knowledge at what particular place between its mouth and its source navigability ceases. And so it may well be doubted whether the courts will take judicial notice of that fact. It would seem that such a matter was one requiring evidence and to be determined by proof."

The Federal Rule Controls.

Although under Minnesota law a river is navigable if it is capable of use for floating a saw log (*Clark vs. Pigeon River, Etc., Co., supra,* and cases cited), the question of navigability is here a question to be determined by Federal law and not by local standards, inasmuch as Federal questions alone are here involved.

U. S. vs. Holt State Bank, 270 U. S. 49.

Board of Hudson River District vs. Fonda, 217 N. Y. S. 781.

Under the Federal rule, the river is non-navigable.

U. S. vs. Holt State Bank, supra.

Leovy vs. U. S., 177 U. S. 621.

U. S. vs. Rio Grande, supra.

Board of Hudson River District vs. Fonda, supra.

Duluth Lbr. Co. vs. St. Louis Boom & Improvement Co., 17 Fed. 419.

In the Holt Bank case, the test was thus stated:

"The rule long since approved by this Court in applying the Constitution and laws of the United States is that streams or lakes which are navigable in fact must be regarded as navigable in law; that they are susceptible of being used in their natural and ordinary condition as highways for commerce over which trade and travel are or may be conducted in the customary modes of trade and travel on water; and further that navigability does not depend on the particular mode in which such use is or may be had—whether by steamboats, sailing vessels or freight boats—nor on an absence of occasional difficulties in navigation, but on the fact, if it be the fact, that the stream, in its natural and ordinary condition, affords a channel for useful commerce."

In the Leovy case, this Court held that the mere capacity to pass a boat of any size, however small, from one stream or rivulet to another, was not sufficient to constitute it a navigable water of the United States within Federal statutes making it a misdemeanor to obstruct navigable waters, saying:

> "The term 'navigable waters of United States' has reference to commerce of a substantial and permanent character to be conducted thereon."

In the Rio Grande case, the Rio Grande River in New Mexico was held non-navigable, though the proof showed that at times of temporary high water it could be used by small boats and for the driving of logs.

In the Fonda case, the New York Court, applying the Federal test, held that the Sacandoga River was non-navigable, notwithstanding that it could be used, with the aid of lumberjacks and artificial aids, in floating saw logs during certain months of the year.

In the Duluth Lbr. Company case, the Court held:

> "The word 'navigation' in all the statutes of the United States and in the constitutions and all the treaties does not mean the running of saw logs down a river."

A river may be navigable in part and non-navigable in another part within the Federal rule.

U. S. vs. Rio Grande, supra.

Oklahoma vs. Texas, 258 U. S. 574.

Brewer-Elliott Oil & Gas Co. vs. U. S., 260 U. S. 77.

U. S. vs. Utah, 283 U. S. 64.

Navigable character, though once existing, may be lost.

> "It does not follow that because a stream or body of water was once navigable it has since continued and

remained so. Changes may occur, especially in small and unimportant waters, from natural causes, such as the gradual attrition of the banks and the filling up of the bed with deposits of the soil, the abandonment of use followed by the encroachment of vegetation and the selection by water of other and more natural and convenient channels of escape, that work a destruction of capacity and utility as a means of transportation; and when this result may fairly be said to be permanent, a stream or lake in such condition should cease to be classed among those waters that are charged with a public use."

Harrison vs. Fite, supra.

Pigeon River Has Been Recognized as Non-Navigable by Congress.

In the act authorizing appellant to improve the portion of the river opposite the Grand Portage Indian Reservation (31 Stat. 1455, chap. 878), the improvements are authorized "for the purpose of making said river at said point navigable for floating logs."

This Congressional recognition of the necessity of improvement for floating logs is equivalent to a Congressional declaration of non-navigability.

The Complaint Alleges Non-Navigability.

The complaint pleads "that prior to appellant's improvements it was at all times incapable of use for the driving, handling and floating of logs, pulpwood and timber of other sorts thereon" (R. 6). Adaptability for navigation in its natural state is the test; hence, it must be so considered on this appeal.

Record and Facts Before the Court.

The record and historical and geographical facts properly before this Court clearly indicate and may even compel a conclusion that it is non-navigable.

The maps pleaded as exhibits (R. 11-25) show that its mouth below High Falls, where the water is at lake level, is navigable, but that from the Falls upstream it is non-navigable. High Falls has a drop of about eighty feet. The total fall of the river from Fort Charlotte (Exhibit E) to Lake Superior, some sixteen or seventeen miles by water, is about 675 feet. The river during this distance is rapid and turbulent, an almost continuous succession of falls and rapids. On either side lie high and precipitous hills. The channel, such as it is, runs between steep cut rocky cliffs, the river bed at times approaching the character of a canyon. The bed is broken by large masses of rock brought down by the process of erosion. The principal falls, proceeding upstream, are High Falls, Middle Falls, Horn Rapids and the Cascades.

Below Fort Charlotte it could not be navigated by canoe.

George M. Schwartz, professor of geology at the University of Minnesota, in an article "Topography and Geology of the Grand Portage" (Minnesota History Bulletin, Vol. 9, page 27, published by the Minnesota Historical Society), says:

> "The Pigeon River, from the location of Fort Charlotte to its mouth, flows practically due east. In detail, however, the stream is exceedingly crooked and the river flows nearly twenty miles to reach a point twelve miles away. This stretch of the river is not only crooked but also very swift, and is interrupted by falls as well as rapids. At places the river flows in a steepsided canyon with very rugged country on either side. It was thus

always out of the question to navigate the river by canoe from the mouth to the site of Fort Charlotte and it was equally impossible to find a good portage along the river."

In "The History of the Grand Portage," by Solon J. Buck, professor of history at the University of Minnesota (Minnesota History Bulletin, Vol. 5, page 14) he says that "* * * the Pigeon River, through the last twenty miles of its course before it flows into Lake Superior, is so obstructed by falls and by cascades in rocky canyons as to be impossible of navigation."

James Ferguson, writing to Daniel Webster in connection with the negotiation of the Webster-Ashburton Treaty, said:

"At the mouth of the Pigeon River, there is probably about three hundred yards in length of alluvial formation; but the river above that, as far as to near Fort Charlotte, runs between steep cut rocks of basaltic or primitive formation, and is a succession of falls and rapids for nearly its whole length—the last cataract which is within about a mile of its mouth, being almost one hundred feet in height. * * *"

Senate Documents, Third Session, 27th Congress, Vol. I.

Above Fort Charlotte it could only be traveled in part by canoe.

Sir Alexander McKenzie, writing in "Voyages from Montreal on the River St. Lawrence Through the Continent of North America to the Frozen and Pacific Oceans," published in London in 1801 describes a canoe trip in the upper portion of the river above Fort Charlotte, he having reached that point by proceeding overland on the Grand Portage Trail from Lake Superior, as follows:

"* * * In these canoes, thus loaded, they embark at the north side of the portage, on the River Au Tourt (Pigeon), which is very inconsiderable; and after about two miles of a westerly course, is obstructed by the Partridge Portage, six hundred paces long. In the spring this makes a considerable fall, when the water is high, over a perpendicular rock of one hundred and twenty feet. From thence the river continues to be shallow and requires great care to prevent the bottom of the canoe from being injured by sharp rocks, for a distance of a mile and a half to the prairie or meadow, when half of the loading is taken out and carried by part of the crew, while two of them are conducting the canoe among the rocks, with the remainder, to the Carreboeuf Portage, three miles and a half more, when they unload and come back two miles, and embark what was left for the other hands to carry, which they also land with the former; all of which is carried six hundred and eighty paces, and the canoe led up against the rapid. From hence the water is better calculated to carry canoes, and leads by a winding course to the north of west three miles to the Outard Portage over which the canoe, and everything in her, is carried for two thousand four hundred paces. At the further end is a very high hill to descend, over which hangs a rock upward of seven hundred feet high. Then succeeds the Outard (Fowl) Lake, about five miles long, lying in a northwest course and about two miles wide in the broadest part."

From this it appears that though travel by light canoe was possible in the river above Fort Charlotte (R. 19), this was accompanied with great difficulty. It was necessary to make three portages above Fort Charlotte in order to reach

South Fowl Lake. One of these, Partridge Portage, 600 paces in length, was about two miles above the Fort; another, Carreboeuf Portage, about 600 paces in length, was five miles above the Fort, and the third, Outard (Fowl) Portage, is indicated on Exhibit H (R. 25) as Fowl Portage and is better than a mile and a quarter in length and departs a full quarter mile from the river on the Canadian side. The use of these portages was made necessary by the fact that it was impossible to navigate such lengths of the upper portion of the river even by light canoe.

The river in its natural state is therefore a non-navigable water of the United States.

II.

THE BOUNDARY AND TERRITORIAL SOVEREIGNTY OF THE STATE EXTENDS TO THE INTERNATIONAL BOUNDARY AT MIDSTREAM IN THE RIVER.

The northeasterly boundary of Minnesota is thus defined in its Organic Act:

> "* * * thence down said river (St. Louis) to and through Lake Superior; on the boundary line of Wisconsin and Michigan until it intersects the dividing line between the United States and the British Possessions; thence up Pigeon River, and following said dividing line to the place of beginning. * * *"
>
> *Act February 26, 1857*, 11 Stat., chap. 60.

By the Webster-Ashburton Treaty, this dividing line between the United States and the British Possessions was defined as:

> "* * * to the mouth of Pigeon River and up the said river, to and through the North and South Fowl

Lakes, to the lakes of the height of land between Lake Superior and the Lake of the Woods; thence along the water communications to Lake Saisaginaga, and through that lake; thence, to and through Cypress Lake, Lac du Bois Blanc, Lac la Croix, Little Vermilion Lake, and Lake Namecan, and through the several smaller lakes, straits or streams, connecting the lakes here mentioned, to that point in Lac la Pluie, or Rainy Lake, at the Chaudiere Falls, from which the commissioners traced the line to the most northwestern point of the Lake of the Woods."

8 *Stat.* 572.

The Root-Bryce Treaty of 1908, Article V, provides:

"In order to complete and perfect the demarcation of the international boundary line between the United States and the Dominion of Canada from the mouth of Pigeon River * * * to the northwesternmost point of the Lake of the Woods, which boundary is defined in Article II of the Treaty of Peace * * * dated September 3, 1783, and in Article II of the Treaty of August 9, 1842 * * *.

"* * * each of the High Contracting Parties shall appoint * * * Commissioners, who shall re-establish and fix the actual location of said entire boundary described and charted as aforesaid * * *.

"The line so defined and laid down shall be taken and deemed to be the international boundary as defined and established under the aforesaid treaties from the mouth of Pigeon River to the northwesternmost point of the Lake of the Woods."

36 *Stat.* 2141, Article V.

This boundary, so determined, is shown on the Inter-

national Joint Boundary Commission maps, pleaded as exhibits.

From this it is clear that the northeasterly boundary of Minnesota is co-incident with the International Boundary in the river and is not, as appellee claimed in the court below, the southwesterly bank of the river.

The jurisdiction of the state is co-extensive with this boundary subject only to the limitation that it should not be so extended as to entrench upon the assumed authority of the national government or to impair rights secured or perfected by the Constitution.

Henderson Bridge Co. vs. Henderson, 173 U. S. 592.

Manchester vs. Massachusetts, 139 U. S. 264.

Humboldt, Etc., Ass'n vs. Christopherson, 73 Fed. 239 (C. C. A.).

The northern boundary of Minnesota in Rainy River is similarly defined by the Enabling Act and these Treaties. It has been held that the boundary and territorial sovereignty of Minnesota extends to the International Boundary in that river.

Rainy Lake River Boom Co. vs. Lumber Co., 162 Fed. 287.

Ex parte Dove, 49 Fed. (2d) 816.

State vs. Dove, 183 Minn. 272 (236 N. W. 322).

In the Rainy Lake case, involving rights of a boom company in that river, the Court said:

> "* * * The jurisdiction of the state of Minnesota could not extend beyond the center channel of the river, * * *. The only ground upon which the power of the state of Minnesota to make regulations to be asserted through a corporation, as this boom company, respecting the navigation of and floating logs on waterways, is that

> it is within its territory. * * * It may be conceded that either party to this treaty might authorize the construction of booms or other artificial structure within the boundary of its jurisdiction to aid in the floating of logs. * * *"

In *Ex parte Dove*, the Court held that the Federal government had not yet taken over the regulation of fishing in Rainy River and the state had the power to regulate it on its side of the boundary.

> "If the subject-matter is covered by state regulation, that regulation should not be stricken down or interfered with until a real conflict between state and federal authority or between state laws and the treaty should arise. No such situation has developed here."

In *State vs. Dove, supra*, the Court held that the "free and open" provision of the Webster-Ashburton Treaty "does not relate to the regulation of fishing in the waters referred to (Rainy River)," and that "the use here spoken of is for travel," and that until the joint governments, under authority of the Root-Bryce Treaty of 1908, took over the regulation of fishing in that international water, "there has been no withdrawing of the state's jurisdiction to control and regulate the catching of fish in that part of Rainy Lake which lies within its own territory, that is in this case, within Koochiching County."

It follows that the territorial boundary and sovereignty of Minnesota likewise extends to the International Boundary in Pigeon River.

III.

THE MAINTENANCE OF APPELLANT'S WORKS AND THE COLLECTION OF REASONABLE CHARGES FOR THEIR USE IS AUTHORIZED BY ACT OF CONGRESS.

Act, March 3, 1901 (31 Stat. 1455, chap. 878), provides that appellant is authorized "to enter upon and improve the Pigeon River at what is known as the cascades of said river for the purpose of making said river at said point navigable for floating logs, and to that end to enter upon the unallotted lands and, with the consent of the allottees, upon any allotted lands adjacent to said cascades, of the Grand Portage Indian Reservation, in said state, and to construct such sluice dams, wing dams, bulkheads, spill dams and other works necessary for said purpose."

It further provides "that said river, after being so improved, shall be open at all times to the free passage of all timber cut from said Grand Portage Indian Reservation, and to the passage of all other timber for a reasonable charge therefor."

Although this statute is not pleaded as a basis of appellant's rights, the Court must take judicial notice of it.

It is not a private bill as defined by 28 Stat. 609 (44 U. S. C. 189), but is a public bill appearing in the Statutes at Large as such. It must therefore be judicially noticed without pleading.

Matter of Dunn, 212 U. S. 374.
Texas & P. R. Co. vs. Docy, 166 U. S. 606.
Gardner vs. The Collector, 6 Wall. 499, 508.
Case vs. Kelly, et al., 133 U. S. 21.

The authority to construct its works is subject to rules and regulations to be prescribed by the Secretary of the

Interior and the company is required to construct suitable fishways to be approved by the United States Fish Commission.

There being no proof to the contrary, appellant's compliance with these conditions must be presumed.

Smith vs. Chesapeake & O. Canal Co., 14 Pet. 45.
Southern Pac. Co. vs. Stewart, 245 U. S. 359.
American Ry. Express Co. vs. Lindenberg, 260 U. S. 584.

The Act is in the nature of a contract for the mutual benefit of both the Federal government and appellant.

Appellant purchased timber from the government, improved the river so as to permit timber, taken from these lands by the allottees, to be transported for sale, and gave a perpetual free right of passage for the benefit of all timber on the Reservation, thus enhancing the value of these lands and directly benefitting the Federal government. In consideration thereof, the Federal government gave its consent to the improvements and authorized the collection of tolls from all timber other than that cut on the Reservation. Appellant has fulfilled its part of the bargain. The Act is therefore of particular force and binds the national honor.

Construction of the Act.

As was explained by Mr. Morris, of Minnesota, who introduced the House Bill, when unanimous consent was obtained to call it up for a vote (Congressional Record, 56th Congress, Second Session, page 3462), it was only considered necessary by reason of the existence of the Reservation adjacent to a portion of the river, the stream being evidently considered non-navigable and Congressional authority necessary only by reason of this circumstance.

We claim, however, that it conferred rights upon appel-

lant throughout the entire length of the river, not simply that portion adjacent to the Reservation.

We have heretofore mentioned certain works: a dam and sluiceway shown on Exhibit E, within the Reservation. Upon that exhibit their location is indicated by the Joint Boundary Commission as "The Cascades." It is not this dam and sluiceway alone which the Act authorized.

From the wording of the Act, giving the right "to enter upon and improve Pigeon River at what is known as the cascades of said river for the purpose of making said river at said point navigable for floating logs," it may be claimed that the bill only authorized the one dam and sluiceway at this one point.

Opposed to this construction, we have the following considerations compelling the broader construction for which we contend:

(1) The term "the cascades" is not capitalized; hence, not used as a proper name—the style of a particular point.

(2) Cascade, the noun, is defined in Webster's New International Dictionary as "a fall of water over a precipice as in a river or brook, especially a small one or one of a series; a waterfall less than a cataract." In the Act, the plural "cascades," is used; hence, reference is made to a series or succession, a number of such falls, a term aptly describing the entire length of the river below Fort Charlotte.

(3) The right is given to enter "upon the unallotted lands and with the consent of the allottees upon any allotted lands adjacent to said cascades." Since Indian allotments of agricultural lands usually comprise eighty acres, appellant is given the right to enter upon Reservation lands adjacent to a considerable length of the river rather than but a

short stretch adjacent to but one, or at the most, two allotments.

(4) The Act gives the right, not to construct one dam and one sluiceway, but to construct "sluice dams, wing dams, bulkheads, spill dams and other works necessary for said purpose," and hence to construct the number of dams of various sorts necessary to make this river available for log driving throughout its entire length below Fort Charlotte.

(5) The Act should be construed with a view to making it effective for the purpose intended which was to so improve the river, throughout its entire length, as to make it possible to get out timber, not only from the Reservation, but from all other points. Obviously, the construction of a single dam and sluiceway would of itself accomplish nothing, other than the waste of a considerable amount of money, if unaccompanied with the building of such other flooding, side, wing and rolling dams and sluiceways in other parts of the river and such clearing and straightening of the channel as would make it possible to drive logs down the river's entire length from the one dam and sluiceway specifically mentioned.

These considerations compel a construction that the Act is applicable to the entire length of the river below Fort Charlotte.

However, it probably makes no very great difference, on this appeal, how this question of construction is resolved. It is clear that the dam and sluiceway at the Cascades, at least, are authorized. On a trial of the action, appellant, under the allegations of the complaint, could show that such works were either directly or indirectly made use of in appellee's driving. Notwithstanding the fact that appellee's logs were put into the stream some distance below this dam

and sluiceway, we could show, for instance, that this dam was used to impound and periodically release floods of water so as to flush appellee's logs down the stream, the quantity of water available being insufficient to furnish a continuous flood tide for such purpose.

Even if appellant's rights were entirely derived from this Act and regardless of whether it be given a strict or a liberal construction, this Court must necessarily hold that the complaint states a cause of action for some, if not all the relief sought by appellant, and the decision of the lower court sustaining the judgment of dismissal was therefore error.

IV.

APPELLANT DOES NOT INTERFERE WITH NOR BURDEN FOREIGN COMMERCE.

This question becomes material only to the extent that some of appellant's improvements and the collection of its charges for the use thereof do not have direct Federal authorization.

The extent and nature of the Federal power over foreign commerce is no different than that over interstate commerce. What can be said of Federal power as to the one is equally applicable to the other.

The power is supreme and plenary. It is complete in itself, may be exercised to its utmost extent and acknowledges no limitations other than the Constitution. As to subjects which require a general system or uniformity of regulation, the power of Congress is exclusive. In other matters admitting of diversity of treatment according to the special requirements of local conditions, the states may act within their respective jurisdictions until Congress sees fit to act,

and, when Congress does act, the exercise of its authority overrides all conflicting state legislation. The states therefore cannot impose direct burdens upon interstate commerce. Thus, they can neither tax nor prohibit it. Until Congress acts, they possess, however, a wide range for the permissible exercise of power appropriate to their territorial jurisdiction, although interstate or foreign commerce may be thereby affected. This extends to all matters of a local nature as to which it is impossible to derive from the constitutional grant an intention that they should go uncontrolled pending Federal intervention. Thus, there are certain subjects, though having an obvious and direct relation to interstate commerce, which should not remain unregulated and their regulation should be adapted to local conditions; hence, the absence of regulation by Congress in such matters does not import that there should be no state regulation, but rather that the state should continue to supply the needed regulation until Congress should decide to supersede them.

Minnesota Rate Cases, 230 U. S. 352, 98.

Thus, until Congress took over the control of all the navigable waters of the United States, the states were at all times free to improve portions of navigable waterways within their territorial boundaries and to exact or authorize others to exact tolls or charges for the use thereof, notwithstanding the consequent burden thus placed upon interstate or foreign commerce.

Wilson vs. Blackbird Marsh Co., 2 Pet. 245.

Pound vs. Turck, 95 U. S. 495.

Parkersburg & O. R. Transportation Co. vs. Parkersburg, 107 U. S. 691.

Huse vs. Glover, 119 U. S. 543.

Sands vs. Manistee Improvement Co., 123 U. S. 288.

Monongahela Navigation Co. vs. U. S., 148 U. S. 312.
Lindsay & Phelps Co. vs. Mullen, 176 U. S. 126.
Thames Bank vs. Lowell, 18 Conn. 500.

In the Blackbird Marsh case, *supra*, involving the construction of a dam in a navigable stream under state authority, the court, Marshall, C. J., said:

> "We do not think that the act empowering the Blackbird Creek Marsh Company to place a dam across the creek can, under all the circumstances of the case, be considered as repugnant to the power to regulate commerce in its dormant state."

In *Pound vs. Turck*, *supra*, involving a dam and boom placed in the Chippewa River under authority of the Wisconsin Legislature, the Court said:

> "There are within the state of Wisconsin * * * many small streams navigable for a short distance from their mouths * * * by steamboats, but whose greatest value in water carriage is as outlets to saw logs. * * * In order to develop their greatest outlet in that regard, it is often essential that such structures as dams, booms, piers, etc., should be used, * * * but to the legislature of the state may be most appropriately confided the authority to authorize these structures where their use will do more good than harm, and to impose such regulations and limitations in their construction and use as will best reconcile and accommodate the interest of all concerned in the matter. And since the doctrine we have deduced from the cases recognizes the right of Congress to interfere and control the matter whenever it may deem it necessary to do so, the exercise of this limited power may all the more safely be confided to the local legislature."

In *Huse vs. Glover, supra,* the state of Illinois, through a board of canal commissioners, constructed locks and a dam in the Illinois River and prescribed tolls therefor. Against the objection that this was an interference with interstate commerce, the Court held:

> "The exaction of tolls for passage through the locks is as compensation for artificial facilities constructed, not as an impost upon the navigation of the stream. * * * For outlays caused by such works, the state may exact reasonable tolls. They are like charges for the use of wharves and docks constructed for the purpose of facilitating the landing of persons and freight. The state is interested in the domestic as well as the interstate and foreign commerce conducted on the Illinois River, and to increase its facilities and thus augment its growth it has full power. It is only when, in the judgment of Congress, its action is deemed to encroach upon the navigation of the river as a means of interstate and foreign commerce that that body may interfere and control or supersede it. * * * How the highways of the state, whether on land or by water, shall be best improved for the public good is a matter for state determination, subject always to the right of Congress to intervene. * * *"

In the Sands case, *supra,* the Court said:

> "The internal commerce of the state * * * * is as much under its control as foreign or interstate commerce is under the control of the general government, and to encourage the growth of this commerce and render it safe the states may provide for the removal of obstructions from their rivers and harbors and deepen their channels and improve them in other ways, * * *

and to meet the cost of such improvements the states may levy a general tax or lay a toll upon all who use the rivers and harbors as improved. The improvements are in that respect like wharves and docks constructed to facilitate commerce in loading and unloading vessels."

In the Monongahela case, *supra,* that company had been authorized by Pennsylvania to improve the river of that name by construction of locks and dams and authorized to levy tolls therefor. The Federal government acquired it by eminent domain. The question on appeal was whether the value of the franchise to collect tolls must be paid for, as well as the physical value of the improvements themselves, the Court holding that they must.

"In the absence of Congressional action, the state of Pennsylvania had the power, either acting itself or through a corporation which it chartered, to improve the navigation of the river by means of locks and dams and also to authorize the exaction of tolls for the use of such improvements."

In *Thames Bank vs. Lovell, supra,* quoted with approval in the Monongahela case, the Court says:

"The acts, improving rivers, constructing roads, etc., will never be complained of as interfering with the rights and powers of Congress. The tolls alone are the subject of complaint. But these are only the fair equivalent for privileges which the state had a right to create, and without which these privileges could never have existed. Commerce, therefore, has not been crippled by the tolls, as the defendant claims, but has been extended by them. The legislature of the state creating this corporation, with its duties and its privileges, has come in

aid of the powers of Congress.

"It seems to be admitted, that states may construct canals, turnpikes, bridges, etc., and impose tolls upon passengers and freight as a remuneration for the improvements; and that this may be done, without interfering with the power of Congress to regulate commerce among the states, or its power to establish post offices and post roads. We have not been able to discover a sound distinction between these cases and the one we are considering. Congress has the same power to regulate commerce upon the land as upon the water. A river, to be sure, is a natural channel; but, if it is not a navigable one, it can no more be used for the purpose of commerce than the land, and therefore to convert it from the mere natural channel into a public highway, for commercial purposes, and to levy a toll to reimburse the expense, no more conflicts with the powers of Congress over the commerce of the country than the construction of a canal or a turnpike for the same purposes, with the same tolls. And this, we think is equally true of rivers, which are only navigable to a partial and limited extent, and by artificial and expensive means are rendered navigable to a greater extent, with a reasonable toll levied upon those only who receive the benefit of the extended navigation. The principle is the same in both the cases stated."

In the Mullen case, *supra*, a Minnesota boom company had been authorized by state law to place its works on the Minnesota side of the Mississippi River and to collect charges on logs passing through the boom.

"The state has a right to improve the waterways within its limits and to make reasonable charges for the

use of such improvements, at least until Congress interferes, and either itself assumes control of the improvements or compels their removal. * * * The state of Minnesota had therefore the undoubted right to improve this portion of the Mississippi River lying southwest of the island for the purpose of facilitating the navigation of logs. It could do the work itself or could authorize a corporation to do the work and it could prescribe any reasonable fees for the use of the improvements. * * * We are of the opinion that the improvements made in the Mississippi River by the construction of the boom and its works and the exaction of reasonable charges for the use of such works, including fees of state officials for inspecting and scaling, if done under state authority, cannot be considered in any just sense a burden upon interstate commerce. It is not more than action on the part of a state in furnishing additional facilities for the navigation of the waterway, and for such additional facilities reasonable charges may be exacted."

The improvement and regulation of navigable waterways was for a long time left largely to the states. It was not until 1890 that Congress assumed any material control and then only to a limited extent.

The key to Lake Superior, the St. Mary's or St. Ste. Marie Canal and Locks, was constructed by the state of Michigan out of the proceeds of a land grant from the Federal government and the collection of tolls on all vessels except those owned by the Federal government was authorized. (Act August 26, 1852, 10 Stat. 35.) The canal was administered by a board of control set up by the state and tolls of four cents per enrolled ton were charged all vessels passing

through the locks. Laws Michigan, 1855, page 195 (Michigan Compiled Statutes, 1857, par. 2578).

It was not until 1880 that the Federal government purchased the canal from Michigan and commenced its operation, free from tolls.

Act June 14, 1880, 21 Stat. 180.

The St. Claire River Ship Canal, a necessary link between Lake Erie and Lake Huron, was operated by the Federal government. Discriminatory tolls were formerly charged of British vessels passing through the canal. Equality of treatment was secured by the Treaty of Washington, 1871, Article XXVII, which provided "the government of the United States engages that the subjects of Her Brittonic Majesty shall enjoy the use of the St. Claire Flats Canal on terms of equality with inhabitants of the United States.

17 *Stat.* 863.

In 1890 the erection of obstructions in navigable waters of the United States was first regulated by general law which provided:

> "That the creation of any obstruction not affirmatively authorized by law, to the navigable capacity of any waters, in respect of which the United States has jurisdiction is hereby prohibited."
>
> *Act September 19, 1890,* 26 Stat. 426, chap. 907, sec. 10.

Even under this statute obstructions to navigation authorized by the states might be constructed and continued without authority from Congress, the words "not affirmatively authorized by law" being construed as meaning authorization from either the state or Federal government.

U. S. vs. Bellingham Bay Boom Co., 176 U. S. 211.

By Act July 13, 1892 (27 Stat. 88, chap. 158, sec. 7), permission from the Secretary of War was first required in addition to state authority.

It was not until 1899 that the entire control of navigable waters of the United States was withdrawn from the states and taken over by Congress by the Rivers and Harbors Act of that year.

Act March 3, 1899, 30 Stat. 1151.

Since this enactment permission from the state as to navigable waters within its own territorial limits is still necessary in order to make the authority for the improvement complete and perfect.

Montgomery vs. Portland, 190 U. S. 89.

As late as 1905 private corporations were authorized by Congress to improve navigable waters of the United States and to collect tolls therefor.

In that year the Cumberland River Improvement Company was authorized to improve that river above Burnside, Kentucky, by the construction of locks and dams and to charge tolls for the use of these improvements. The Cumberland is an interstate navigable water.

Likewise, the Nome Improvement Company was authorized to dredge the Snake River near Nome, Alaska, for a distance of five thousand feet from its mouth for the development of harbor facilities and was authorized to levy tolls on all vessels using the harbor.

Act March 3, 1905, 33 Stat. 1117, chap. 1482.

Congress has, however, never assumed to regulate or control non-navigable waters. The power of the states over them remains as it always has been. Within their territorial limits they may either improve or authorize their improve-

ment and may collect or authorize the collection of tolls therefor in the same manner as they formally did in the case of navigable waters.

Undoubtedly, Congress might, under the Commerce Clause, regulate interstate or foreign commerce over non-navigable waters. Its power in that regard is supreme, just as it is over highways used in interstate or foreign traffic. The power has, however, never been exercised and until it is the power of the state is supreme and plenary.

The power of the state to improve or authorize the improvement of the portion of this river—a non-navigable stream—within its territorial limits is similar to the power of the state over its highways, though used in interstate or foreign commerce.

It has frequently been held by this Court, in late decisions, that the states, in the absence of Congressional action, may levy license fees or taxes on the use of their highways in interstate commerce as compensation for the use of facilities provided, and that this is not an unconstitutional burden on interstate commerce.

Hendrick vs. Montana, 235 U. S. 610.
Kane vs. New Jersey, 242 U. S. 160.
International Busses Corp. vs. Blodgett, 276 U. S. 245.
Sprout vs. South Bend, 277 U. S. 163.
International Transit Co. vs. Lindsey, 283 U. S. 183.
Continental Baking Co. vs. Wooding, 286 U. S. 352.
Sproles vs. Binford, 286 U. S. 374.

In the Hendrick case, it was held:

"In view of the many decisions of this Court there can be no serious doubt that where a state, at its own expense, furnishes special facilities for the use of those engaged in commerce, interstate as well as domestic, it

may exact compensation therefor. The amount of the charges and the method of collection are primarily for determination by the state itself; and so long as they are reasonable and are fixed according to some uniform, fair and practical standard, they constitute no burden on interstate commerce."

In *Interstate Transit Co. vs. Lindsey,* the Court said:

"While a state may not lay a tax on the privilege of engaging in interstate commerce, it may impose even upon motor vehicles engaged exclusively in interstate commerce a charge, as compensation for the use of the public highways, which is a fair contribution to the cost of constructing and maintaining them and of regulating the traffic thereon. As such a charge is a direct burden on interstate commerce, the tax cannot be sustained unless it appears affirmatively, in some way, that it is levied only as compensation for use of the highways or to defray the expense of regulating motor traffic."

In the Sproles case, it is said:

"In the instant case there is no discrimination against interstate commerce and the regulations adopted by the state, assuming them to be otherwise valid, fall within the established principle that in matters admitting of diversity of treatment according to the special requirements of local conditions, the states may act within their respective jurisdictions until Congress sees fit to act."

The principles established by these decisions cannot be divorced from application to the instant case, notwithstanding the fact that here we have, not interstate, but foreign commerce; not a highway over land, but a non-navigable waterway.

It therefore follows that the imposition and collection of reasonable tolls for the use of appellant's improvements to the river under authority from the state of Minnesota in no sense offends the Commerce Clause.

V.

THE PORTIONS OF PIGEON RIVER IN WHICH APPELLANT'S IMPROVEMENTS ARE LOCATED WERE NOT "WATER COMMUNICATIONS" WITHIN THE MEANING OF THE TREATY; THEY HAD NEVER BEEN "ACTUALLY USED" AS SUCH; HENCE THE TREATY DOES NOT INHIBIT APPELLANT'S IMPROVEMENTS AND COLLECTION OF TOLLS.

The Treaty provides:

> "That *all the water communications and all the usual portages* along the line from Lake Superior to the Lake of the Woods, *and also Grand Portage*, from the shore of Lake Superior to the Pigeon River, *as now actually used*, shall be free and open to the use of the citizens and subjects of both countries."
>
> 8 *Stat.* 572.

Our position is that the words "as now actually used" refer back to and limit all that precedes; in other words, that the Treaty makes only ~~such~~ of the "water communications" and of the "usual portages" along the boundary line and the Grand Portage as were then "actually used," "free and open" to both countries.

In order to understand the Treaty, reference must first be made to its historical and geographical background.

History and Location of Grand Portage Trail.

We have already referred at length to the character of the river below the point known as Fort Charlotte. This point is indicated on Exhibit E (R. 19), several miles upstream from the Cascades dam and sluiceway, but within the Indian Reservation.

Because of the character of the river and the adjacent country below Fort Charlotte, it was impossible to navigate any part of the river below the Fort, even with the light canoes then in use and it was likewise impossible to follow the line of the river to reach Fort Charlotte.

By reason of this fact the Grand Portage Trail extended from Grand Portage on Grand Portage Bay on Lake Superior, in a northerly and westerly direction, by more or less direct line, a distance of some nine miles, to the Pigeon River at Fort Charlotte (R. 19). This Grand Portage Bay is some six miles westerly from the International Boundary and within the state of Minnesota. It is shown at the extreme easterly end of Exhibit I (R. 27).

The trail was probably located by Indians, but developed by the Northwest Fur Company, a British company, because of the impossibility of reaching the upper Pigeon River in any other way.

In this fur trade, provisions, store and baggage were transferred at Grand Portage Bay from boats used on Lake Superior and packed on human backs along the portage to Fort Charlotte where they were put into canoes and from there carried, alternately by canoe and on the back, along portages where falls or rapids and the contour of the country necessitated their use, to South Fowl Lake. Alternate use of lakes and portages was then made until finally a portage was made across the height of land between South and North

Fowl Lakes and the waters on the other side of the divide extending westerly and into Rainy River, were reached. Furs from the interior were brought down via Fort Charlotte to Grand Portage Bay, in the same way.

In this traffic it was not only necessary to make use of the Grand Portage trail, but of three other well defined portages along the river between Fort Charlotte and South Fowl Lake. It was likewise necessary to make numerous other portages between South Fowl Lake and Lake of the Woods.

These "usual portages" along the boundary as well as Grand Portage as they were "actually used" prior to the Treaty are the ones referred to in its text.

The following note to letters of DePeyster to General Haldimand appears in Wisconsin Historical Collections, Vol. XI (1888), page 123:.

> "The Grand Portage post was at the head of a bay on the northwest coast of Lake Superior, some five miles above (southwest of) the mouth of Pigeon River. From here, there was a carrying place of three leagues (nine miles) in length, northward to a widening of the Pigeon. The Grand Portage settlement was the great halting place of voyageurs and an important depot for the fur trade in that section. At the other end of the trail was another fort, to protect the portage from the north * * * by 1880, under English rule, it was styled Fort Charlotte. * * * After leaving Fort Charlotte the voyageurs ascended Pigeon River, which is crooked and often widens into lakes, frequent short portages being made to avoid the bend and rapids. The intricate watercourses followed were what now form the international boundary as far as the Lake of the Woods; * * *"

At this point we again refer to Sir Alexander McKenzie's description of the necessary portages in the upper part of the river, set forth at length at page 20, ante.

Alexander Henry was a fur trader of the Northwest Company. David Thompson was official geographer and explorer of the same company. Their manuscript journals were edited by Elliott Coues and published in New York by Francis P. Harper in 1897. The following quotation is extracted from this work, Vol. I, page 6:

"Saturday, July 19, 1800, 3 P. M., our baggage and other necessities having been carried over the portage which is about nine miles, our men fully equipped for the year and their accounts settled, I set off for Fort Charlotte, where I arrived at 5 P. M. The portage was very bad in some places, being knee deep in mud and clay, and so slippery as to make walking tedious.

"Sunday, July 20th. The canoes having been given out to the men to gum and prepare, I found everything ready for our departure. * * *

"At ten o'clock the brigade were all off, and at three o'clock I followed. The water was very low. In a short time we came to Partridge Portage, of about 600 paces over. The road was very slippery and muddy. Having got our baggage over, we embarked and proceeded to the prairie, where our people were camped.

"July 21st. The canoes were early on the water with half a load, which was conveyed so to Grosse Roche (Gross Rock). There we found the water so low that we were obliged to carry all our baggage and canoes over for about 1,000 paces, through a path made by a number of small pines which had lately been blown down. We then, by means of half loads, proceeded to Caribou Portage, over which our baggage was carried

about 700 paces, while the canoes were towed up among the rocks. We then proceeded to Outard (Fowl) Portage with half a load, and put up for the night, having sent the canoes back for the rest."

Other Portages Along the Line.

From the exhibits and historical references heretofore set forth, it appears that in addition to the Grand Portage itself there were numerous other portages "along the line," including the following:

Partridge Portage, 600 paces long, about two miles above Fort Charlotte; Carreboeuf Portage, [illegible]0 paces in length, about five miles above the Forf; Outard (Fowl) Portage, 2,400 paces in length, avoiding the falls and rapids in the portion of the Pigeon River immediately below South Fowl Lake. This latter portage is shown on Exhibit H as Fowl Portage (R. 25). It is better than a mile and a quarter in length and is for the most part a full quarter mile distant from the river and boundary, on the Canadian side. All these portages, though shorter than the Grand Portage, were, in general, considerable distances from the Pigeon River, well within what is now either American or Canadian territory, followed well defined routes through the forest and were made necessary, just as was Grand Portage, by the fact that the river adjacent to them could not be navigated, even by light canoes.

In addition to these, there were other necessary portages farther west along the boundary. The chief of these are shown on Exhibit I (R. 27) and may be briefly enumerated: Moose Portage, between North Fowl and Moose Lake; Long Portage, between Watap and Rose Lake; and a portage over the height of land, between North and South Lakes;

and Bottle Portage, between Iron Lake and Irving Island. When the Treaty was made, the location and line of these portages and of the intervening water communications, was a matter of certain knowledge. Geographical knowledge of the region was then practically limited to this land-water trail itself.

These portages, *as then used*, and the intervening water courses, *as then used*, constituted the boundary line first proposed by Lord Ashburton to Daniel Webster in their negotiations, a line which, as he says, "has the advantage of being known and attended with no doubt or uncertainty in running it."

Construction of the Treaty.

When the meaning of a treaty is uncertain, recourse should properly be had to the negotiations and diplomatic correspondence of the contracting parties relating to the subject-matter and to their own practical construction of it.

Neilson vs. Johnson, 279 U. S. 47.

U. S. vs. Texas, 162 U. S. 1.

A treaty is to be read in the light of the conditions and circumstances existing at the time it was entered into, with a view to effecting the objects and purposes of the states thereto by contracting.

Ross vs. McIntyre, 140 U. S. 453.

Bearing on its construction, we have not only President Tyler's message submitting the Treaty to the Senate, but also the diplomatic correspondence between Daniel Webster and Lord Ashburton tracing the negotiations between them and indicating the purpose of the respective governments. This was all made public and is found in Senate Documents, Third Session, 27th Congress, Vol. 1. This, we believe, es-

tablishes the correctness of our position. We will hereafter refer to extracts from this correspondence without further specific citation.

This correspondence shows that the words "*as now actually used*" refer back to and limit all that precedes; hence, that the Treaty makes only such of the "*water communications*" and of the "*usual portages*" along the line and the Grand Portage as then formed links in this land-water trail, "*free and open*" to both countries.

The portion of Pigeon River extending downstream from Fort Charlotte was never a part of this land-water trail and was not therefore made "*free and open.*" In its place was substituted the Grand Portage Trail.

Likewise, the portion of Pigeon River extending for a mile and a quarter below South Fowl Lake, wherein appellant has a flooding dam, was never a part of this land-water trail and was not made "*free and open.*" In its place was substituted Outard (Fowl) Portage, a mile and a quarter in length and a full quarter mile distant from the river and boundary, on the Canadian side of the river.

In the Clark case, Judge Kenyon said:

> "As a matter of grammatical construction an argument might be made that the term 'as now actually used' applies to all the water communications and early portages and not merely to Grand Portage, but it appears from the record that Grand Portage alone of all the portages is not 'along the line,' and we think therefore the words 'as now actually used' refer only to Grand Portage. Any other theory would give the Treaty a narrow and apparently distorted construction."

In this statement the Court made a wrong assumption

of fact. Fowl Portage, for instance, was not "along the line," although closer to it than Grand Portage, and throughout its entire length was a full quarter mile within British territory. Its route has been marked on the International Boundary Commission maps and appears on Exhibit H (R. 25).

The claim here made was likewise presented to the Canadian Supreme Court in the recent *Arrow River, Etc., Co. vs. Pigeon Timber Co., Ltd., supra.* Of the five Judges, Justice Lamont, concurred in by Justice Cannon, cites the Clark case and adheres to the construction there given the Treaty. Justice Smith, Justice Renfert concurring, takes the opposite view and holds:

> "The right preserved by the provision of the Treaty quoted was the right *to use the water communications and portages then in use.* There could, so far as I can see, have been no reason for preserving a right to use Grand Portage that would not apply to the other portages, and the language as used appears to apply to all and to all water communications, and I think should be so construed. What was being dealt with and what was in the contemplation of the parties was travel and transportation over the water communications and portages *as then used,* and there was, in my opinion, no thought or intention of dealing with the use of these non-navigable rapids and falls that were not in use and could not be used, the passing of which was provided for by portages."

The diplomatic correspondence preliminary to the Treaty, taken in connection with the history and situation of the trail and various portages, compels a conclusion in accordance with that of Justices Smith and Renfert of the

Canadian Supreme Court: That the provision in question applies only to such of the portages and of the water communications as were then in use and that the decision of the Court below was therefore wrong.

Indeed the use of the term "water-communications" of itself implies a meaning of *waters used as a means of communication*. If this is not so, why was the word "waters" not used instead?

History of Selection of the Boundary.

The boundary between the United States and Canada, west of Lake Superior, was never definitely fixed until the Treaty of 1842.

The Treaty of Paris (8 Stat. 80, Article II) describes this boundary as "through Lake Superior northwards of Isles Royale and Philipeaux to the Long Lake; thence through the middle of said Long Lake and the water communications, between it and the Lake of the Woods."

Long Lake was not indicated on any existing map and at the conclusion of the War of 1812 the commissioners who had been appointed to settle boundary disputes between the two countries were unable to agree upon this portion of the boundary.

Lord Ashburton, on July 16, 1842, wrote Mr. Webster in reference to the then pending settlement of this boundary:

> "* * * it really appears of little importance to either party how the line be determined through the wild country between Lake Superior and Lake of the Woods, but it is important that some line should be fixed and known.
>
> "The American commissioner asked for the line from Lake Superior, up the River Kamanastiguia, to the lake

called Dog Lake, which he supposed to be the same as that called Long Lake in the treaties; thence through Sturgeon Lake to the Lac La Pluie, to that point where the two lines assumed by the commissioners again meet.

"The British commissioner, on the other hand contended for a line from the southwestern extremity, at a point called le Fond du Lac (now within the city of Duluth), to the middle of the mouth of the estuary or lake of St. Louis River; thence up that river, through Vermilion River to Lac La Pluie.

"Attempts were made to compromise these differences; but they failed, apparently more from neither party being willing to give up the island of St. George's, than from much importance being attached to any other part of the case.

"Upon the line from Lake Superior to the Lake of the Woods, both commissioners agreed to abandon their respective claims, and to adopt a middle course, for which the American commissioner admitted that there was some ground of preference. This was from Pigeon River, a point between Kamanastiguia and the Fond du Lac; and although there were differences as to the precise point near the mouth of Pigeon River, where the line should begin, neither party seemed to have attached much importance to this part of the subject.

"I would propose that the line be taken from a point about six miles south of Pigeon River, where the Grand Portage commences on the lake, and continued along the line of said portage, *alternately by land and water*, to Lac La Pluie—*the existing route by land and by water remaining common to both parties.* This line has the advantage of being known, and attended with no doubt or uncertainty in running it. * * *

The Lac La Pluie he refers to is the same as Rainy Lake, from which point westerly the boundary had been definitely determined in 1783 by the Treaty of Paris.

Had this proposal been accepted, the alternate land-water trail itself, extending from Lake Superior to Rainy Lake, as then used, would have constituted the common boundary. Apparently the British attached no importance to any part of the Pigeon River except such parts as were necessary links in this chain of communications. The only consideration of the British commissioner was to secure for British subjects the right to the "*common use*" of this land-water trail.

On July 25, 1842, Mr. Webster wrote James Ferguson, an astronomer and surveyor, who had surveyed this section for the commissioners appointed by the Treaty of Ghent, making this reference in the letter:

> "There is said to be *two lines of communication, each partly by water and partly by portages*, from the neighborhood of Pigeon River to the Rainy Lake; one by way of Fowl Lakes, the Saganaga Lake, and the Cypress Lake; the other by way of Arrow River and Lake; then by way of Saganaga Lake, and through the River Maligne, meeting the other route at Lake La Croix, and through the River Nemekan to the Rainy Lake. Do you know any reason for attaching greater preference to either of these two lines? Or do you consider it of no importance, in any point of view, which may be agreed to? * * *"

To this Ferguson replied that there was no reason for preferring one over the other, but expressed a preference for a boundary generally following the "old commercial route" by commencing at Pigeon River.

Mr. Webster then, on July 26, 1842, wrote to Lord Ashburton proposing an alternative, the description of the boundary later embodied in the Treaty, to which he appended the provision of Article II here in question. Explanatory of this proposal, he wrote:

> "It is desirable to follow the description and the exact line of the original Treaty as far as practicable. There is reason to think that 'Long Lake,' mentioned in the Treaty of 1783, meant merely the estuary of the Pigeon River, as no lake called 'Long Lake,' or any other water strictly conforming to the idea of a lake, is found in that quarter. This opinion is strengthened by the fact that the words of the Treaty would seem to imply that the water intended as 'Long Lake' was immediately joining Lake Superior. In one respect, an exact compliance with the words of the Treaty is not practicable. There is no continuous water communication between Lake Superior and the Lake of the Woods, as the Lake of the Woods is known to discharge its waters through the Red River of the North into Hudson's Bay. The dividing height or ridge between the eastern sources of the tributaries of the Lake of the Woods, and the western sources of Pigeon River, appears, by authentic maps, to be distant about forty miles from the mouth of the Pigeon River, on the shore of Lake Superior. * * *"

The adoption of Webster's line, without further agreement regarding the use of the old land-water trail, would have prevented British citizens from passing through American territory on Grand Portage and on other necessary portages on the American side of the boundary, and would likewise have prevented our own citizens from passing

through British territory where the existing portages made this necessary. Ashburton had insisted that the land-water trail be subject to the common use of the citizens of both countries. This had evidently been his chief reason for proposing that it, rather than Pigeon River and the other waters along the present line, be established as the boundary. In order to answer the objection which Mr. Webster knew would be raised, were a common use of the land-water trail not provided for, he added the provision here in question and explained it in his letter, as follows:

> *"The broken and difficult nature of the water communication from Lake Superior to the Lake of the Woods renders numerous portages necessary; and it is right that these water communications and these portages should make a common highway, where necessary, for the use of the subjects and citizens of both governments. * * *"*

In so providing there was no thought of preserving any right to the common use of the portion of Pigeon River below Fort Charlotte, nor to any other portions of the river around which portages had to be made. The sole consideration that prompted the insertion of this provision in the Treaty was the British commissioner's anxiety for the preservation of the land-water trail and the consequent agreed purpose of the two negotiators to secure for the "common use" of the citizens of both countries the alternate land-water route *"as now actually used."* This is evident from Mr. Webster's explanation in this letter that "it is right that *these water communications* and *these portages* should make *a common highway where necessary* for the use of the subjects and citizens of both governments."

In the light of the history of the trial, the topography and

geography of the river and adjacent country and the purpose of the two commissioners evidenced by their correspondence, it is quite apparent that the words *"as now actually used"* modify all that precedes. It is only such portages and only such portions of the Pigeon River *as were then in use* that were intended to constitute this *common highway*.

We therefore submit that the lower court erred in holding that the maintenance of appellant's works in the portion of the Pigeon River below Fort Charlotte was prohibited by the Treaty provision, and likewise erred in holding that the maintenance of appellant's flooding dam at the outlet of South Fowl Lake was similarly prohibited.

VI.

THE WORDS "FREE AND OPEN" DO NOT IMPLY FREEDOM FROM TOLLS OR CHARGES FOR THE USE OF APPELLANT'S IMPROVEMENTS.

We further claim that the expression *"free and open"* used in the Treaty, was used in the common, accepted sense of that term as interpreted by the courts of this country.

It does not imply freedom from tolls or charges for the use of special facilities provided, but means simply "common to the citizens and subjects of both countries," "thrown open to the use and enjoyment of the citizens of both countries on equal terms," or in other words, "open without discrimination to the citizens of each, without direct tax, impost or duty."

Appellant is a public service corporation. It is bound by Minnesota statutes and the Act of Congress to collect only "reasonable charges." These fall on everyone alike regardless of citizenship. Appellant is forbidden to discriminate. The improvements, under the allegations of the

complaint, do, in fact, make possible log driving, a thing which is otherwise impossible. The Treaty, therefore, does not apply.

The decision in the Clark case and in the court below is adverse to our claim. In thus holding, the court below relied upon *Rainy Lake Boom Corporation vs. Rainy River Lbr. Co.*, 27 Ont. Law Reports 131, and *Rainy Lake Boom Co. vs. Rainy River Co.*, 162 Fed. 287.

The two Rainy River cases are distinguishable and in no way controlling. They did not involve the question of whether tolls could be collected for the use of improvements to navigation made entirely within the territorial limits of the state, but rather involved the unauthorized extension by a Minnesota corporation of its booms from the Minnesota side across the International Boundary line in Rainy River into Canadian waters, and the catching and impounding there of Canadian timber floating down on the Canadian side of the river. No such question is here involved. Under the allegations of the complaint, appellant is operating strictly on its own side of the river and is seeking nothing other than reasonable charges for the use of facilities on the American side of the river made use of by appellee. Appellee in its driving brings its timber, in part, at least, across the boundary, and, as to such of it as was not directly brought across the boundary, makes use of appellant's improvements; for instance, the portion of the dams maintained by appellant, in order to secure flood tides to work its logs downstream.

Here again we have support for our claim from the Canadian Supreme Court in *Arrow River, Etc., Co. vs. Pigeon Timber Co., Ltd., supra*. Chief Justice Anglin, concurring in the reversal of the lower court, after quoting the Treaty provision, says:

"It was merely intended to ensure to the citizens of both countries equality of rights in regard to the water communication, portages, etc., and * * * it never was intended thereby to provide that, in no event, should either party to the Treaty be at liberty, as regards citizens of its own nationality, to impose tolls for the use of improvements lawfully to be made thereon. In other words, where either party to the Treaty saw fit to impose tolls upon its own citizens in regard to such improvements, it should be at liberty to impose like tolls (but none greater) on citizens of the other country for the use of the improvements so made. Otherwise, it would follow that neither country could impose any tolls whatsoever upon its own citizens because that would interfere with the water communications, portages, etc., being 'free and open' to the use of the subjects of both countries."

Justices Lamont and Cannon, concurring in the reversal, disagree with the Chief Justice, however, holding:

"The meaning of these words in the clause is that the citizens of both countries are to be at liberty, as a matter of right, to travel these waters on both sides of the fixed boundary line without let or hindrance from anyone or having to pay anything for so doing. * * *"

The other two Justices do not determine this question of construction, that being unnecessary for their concurrence in the reversal.

Meaning of Term "Free and Open."

The words, "free and open," as applied to navigation and commerce is not a new thing in our history. Similar provisions are contained in various state Constitutions, Enabling Acts and the Ordinance creating the Northwest Territory. The phrase has been construed on several occasions, not only by this court but by several of our lower courts, and in each instance the construction for which we here contend has been placed upon the words.

Huse vs. Glover, 119 U. S. 543.

Sands vs. Manistee River Improvement Co., 123 U. S. 288.

Cardwell vs. American River Bridge Co.; 113 U. S. 210.

Hamilton vs. Vicksburg, 119 U. S. 280.

Williamette Iron Bridge Co. vs. Hatch, 125 U. S. 9.

Duluth Lbr. Co. vs. St. Louis Boom & Improvement Co., 17 Fed. 419.

Osborne vs. Knife Falls Boom Co., 32 Minn. 412 (21 N. W. 704).

In re Southern Wis. Power Co., 122 N. W. 801, 140 Wis. 245.

In *Huse vs. Glover*, *supra*, the claim was made that the Ordinance creating the Northwest Territory, providing that navigable waters should be highways and "forever free," "without any tax, impost or duty therefor," prevented the state of Illinois, through its Board of Canal Commissioners, from improving the Illinois River by the construction of locks and a dam and charging tolls therefor. In disposing of the objection, the court held:

> "The provision of the clause * * * has reference to navigation in their natural state. It did not con-

template that such navigation might not be improved by artificial means. * * * For outlays caused by such works the state may exact reasonable tolls. They are like charges for the use of wharves and docks constructed to facilitate the landing of persons and freight and the taking of them on board."

In the *Sands Case, supra*, the state of Michigan chartered a boom company on the Manistee River with powers similar to those given the appellant in the instant case. The claim was made that this conflicted with the Ordinance creating the Northwest Territory, but the court, following *Huse vs. Glover*, held that it did not, and permitted the collection of tolls by the boom company.

The Cardwell case involved the California Organic Act, which provided that all navigable waters "shall be common highways and forever free as well to the inhabitants of the said state as to the citizens of the United States, without any tax, impost or duty therefor." This was construed as having but one object: "To insure a highway equally open to all without preference to any and unobstructed by duties or tolls, and thus preventing the use of the navigable streams by private parties to the exclusion of the public and the exaction of any toll for the navigation."

In *Williamette Bridge Co. vs. Hatch, supra*, this court similarly construed a like provision of the Enabling Act of Oregon.

"It does not refer to physical obstructions but to political regulations which would hamper the freedom of commerce. * * * What the people of the old states wished to secure was the free use of the streams and carrying places in the Northwest Territory as fully as it might be enjoyed by the inhabitants of that territory

themselves without any impost or discriminatory burden."

In the *Duluth Lumber Co. Case, supra*, the claim was made that a Minnesota boom company operating on the St. Louis River could not collect tolls for the use of its dams by reason of the Minnesota Organic Act, which provides that the navigable waters "shall be common highways and forever free as well to the inhabitants of said state as to all other citizens of the United States, without any tax, duty, impost or toll." The court held that this did not prevent the collection of such tolls.

In the Osborne case, also, involving a Minnesota boom company on the St. Louis River, and the claim that the Minnesota Enabling Act prohibited the collection of tolls for the use of dams constructed by it, the court held that it did not; that what was done was not to deprive the log drivers of the use of the river but to regulate its use for the common benefit. The charging of tolls was not for the use of the river but "to compensate the defendants for their outlay in erecting and maintaining the works which the Legislature has deemed proper to facilitate the common use of the stream."

In *In re Southern Wisconsin Power Co., supra*, construing the Wisconsin State Constitution, which provides that navigable waters "shall be common highways and forever free," the court held that this "does not refer to physical obstructions of these waters but refers to political regulations which would hamper the freedom of commerce."

Similar Provisions of Other Treaties.

The use of the words, "free and open," has not been an uncommon thing in the history of treaty making between this country and Great Britain.

The eighth article of the Treaty of Paris provides:

> "The navigation of the river Mississippi, from its source to the ocean, shall forever remain *free and open* to the subjects of Great Britain and the citizens of the United States." 8 Stat. 80.

This provision has never been superseded nor modified by any later treaty.

The Treaty of Washington (17 Stat. 863), ratified in 1871, provides, Article XXVI:

> "The navigation of the river St. Lawrence ascending and descending from the 45th parallel of north latitude where it ceases to form the boundary between the two countries, from, to and into the sea, shall forever remain *free and open* for the purposes of commerce to the citizens of the United States, subject to any laws and regulations of Great Britain or of the Dominion of Canada not inconsistent with such privilege of *free navigation*.
>
> "The navigation of the rivers Yukon, Porcupine and Stikine ascending and descending from, to and into the sea, shall forever remain *free and open* for the purposes of commerce to the citizens of Her Britannic Majesty and to the citizens of the United States, subject to all laws and regulations of either country within its own territory not inconsistent with such privilege of *free navigation*."

If the words, "free and open," so restricts our govern-

ment that we cannot construct any improvements in aid of navigation upon these rivers wholly within our boundaries, nor collect tolls therefor, then we have surrendered away a surprising amount of control over our internal waterways. No such construction should be adopted if a less restrictive construction is possible; otherwise, as Anglin, C. J., said in the recent Arrow River case, "It would follow that neither country could impose any tolls whatsoever upon its own citizens, because that would interfere with the water communications * * * being 'free and open' to the use of the subjects and citizens of both countries."

A construction of the term, "*free and open*," as synonymous with "common" or "without discrimination" permits of the improvement of such waters in aid of navigation, and, if necessary or desirable, the collection of tolls to defray the expense thereof. Any other construction not only prevents this but actually requires that the stream be maintained in its original state.

A dam, for instance, is an obstruction to the "free and open" use of a river, if appellee's claim is correct. Any such provision in a treaty, therefore, has the effect, if construed as appellee claims, of surrendering up undoubted rights to create necessary obstructions or aids to navigation.

In the Treaty between the United States and Great Britain consenting to the construction of the Panama Canal (32 Stat. 1903), Article III provides:

> "The canal shall be *free and open* to the vessels of commerce and of war of all nations observing these rules, on terms of entire equality, so that there shall be no discrimination against any such nation or its citizens or subjects in respect of the conditions or charges of traffic, or otherwise."

Notwithstanding this provision, tolls are collected on the Panama Canal. Their collection is evidently not treated as a violation of the "free and open" provision of that Treaty.

It thus appears that the words, *"free and open,"* have, in every instance, been regarded as not inconsistent with the right, without discrimination on account of citizenship, to collect tolls, based on the benefit to navigation conferred by an improvement to navigation, and as only preventing political discrimination, and that the court below erred in not applying that construction to this Treaty.

Cognate Provisions of Webster-Ashburton Treaty.

Article VII provides:

> "The channels in the River St. Lawrence on both sides of the Long Sault Islands and of Barnhart Island, the channels in the River Detroit on both sides of the Island Bois Blanc, and between that island and both the American and Canadian shores; and all the several channels and passages between the various islands lying near the junction of the River St. Claire with the lake of that name shall be *equally free and open* to the ships, vessels and boats of both parties."

Appellee will, we apprehend, argue that the use of the modifying term, "equally," preceding the use of the words, "free and open," indicates an intended difference between that provision and the provision of Article II.

That this is not the case is apparent from the diplomatic correspondence and the President's message. The use of that term rather implies that the meaning of the phrase, "free and open," is as we argue.

President Tyler, in his message transmitting the Treaty to

the Senate for ratification (Senate Documents, Third Session, 27th Congress, Vol. I), with reference to this provision, says:

> "The Treaty made no provision for the *common* use of the waters by the citizens and subjects of both countries. * * * In these three cases, the Treaty provides that all the several passages and channels shall be *free and open* to the use of the citizens and subjects of both countries."

This construction by the Chief Executive, that the words, "free and open," are synonymous with "common," is persuasive of their proper construction.

Likewise, Lord Ashburton, in writing Mr. Webster on July 16, 1842, referring to their negotiations with reference to the rights given under this article, says:

> "We want a clause in our present Treaty to say that for a short distance, viz., from the upper end of Long Sault Island to the lower end of Barnhart's Island, the several channels of the river shall be used *in common* by the boatmen of the two countries."

Mr. Webster in his reply of July 27th agrees that these channels "shall be *severally free and open* to the vessels of both countries," and further "what has been agreed to also in respect to the *common use of certain passages* in the rivers and lakes as already stated must be made a matter of regular stipulation."

Ashburton on July 29th further wrote:

> "I cannot refuse the reciprocal claim made by you to *render common* the passage from Lake Erie into the Detroit River. This must be done by rendering the several passages in those parts *free* to both parties. I should remark also that the *free use* of the navigation

of the Long Sault passage on the St. Lawrence must be extended to below Barnhart's Island for the purpose of clearing those rapids."

"Free and open," "equally free and open," and "common," were, therefore, used synonymously in the drafting of this Treaty.

In Article III, relating to the use of the river St. John, the upper portion of which was wholly within the state of Maine, the middle portion of which formed the common boundary, and the lower portion of which was wholly within New Brunswick, the Treaty provides that the products of either country "shall have *free* access into and through the said river and its said tributaries," and then provides that when within the state of Maine, Canadian products shall have the same treatment as that accorded by Maine to its own products, and similarly while so within Canada, the products of Maine shall have the same treatment as that accorded by Canada to its own citizens.

Here again, the word, "*free*," is so employed as to imply only equality of treatment, rather than absolute freedom.

This is further evidenced by Ashburton's letter of July 11th, where he refers to "the right to use the St. John for floating down the lumber of Maine *on the same terms* as the river is used by the Queen's subjects," and likewise by Webster's letter of the 27th referring to the "right to use the waters of the St. John * * * *without subjection to any discriminatory toll or duty.*"

That this construction is correct is evidenced by the Root-Bryce Treaty of 1909 (36 Stat. 2448), wherein Article I of the Treaty provides:

"* * * The navigation of all navigable boundary waters shall forever *continue free and open* for the pur-

poses of commerce to the inhabitants and to the ships, vessels and boats of both countries *equally, subject, however, to any laws and regulations of either country within its own territory not inconsistent with such privilege of free navigation and applying equally and without discrimination to the inhabitants, ships, vessels and boats of both countries.*

"It is further agreed that * * * *this same right of navigation shall extend* * * * *to all canals connecting boundary waters.* * * * *Either of the High Contracting Parties may charge tolls for the use thereof, but all such* * * * *tolls charged shall apply alike to the subjects or citizens of the High Contracting parties.* * * *"

We therefore submit that the maintenance of appellant's works and the collection of reasonable and non-discriminatory charges based entirely upon the benefit to the user of the improvements is not in any sense an interference with any *"free and open"* use of the river, and the lower court was in error in so holding.

VII.

IF THE TREATY FORBIDS APPELLANT'S WORKS AND COLLECTION OF TOLLS, IT IS SUPERSEDED BY THE ACT OF CONGRESS GIVING APPELLANT SUCH RIGHTS.

We have already argued the construction and effect of this statute (31 Stat. 1455). Appellant's works on the river were specifically authorized by the Act and appellant was permitted to collect reasonable charges for their use in the driving of timber not originating on the Reservation.

It is fundamental that treaty provisions and acts of Con-

gress are of equal rank and therefore that a later enactment will supersede inconsistent provisions of a former treaty.

Thomas vs. Gary, 169 U. S. 264.
Stephens vs. Cherokee Nation, 174 U. S. 445.
U. S. vs. Lee Yen Tai, 185 U. S. 213.
Johnson vs. Beonne, 205 U. S. 309.
Alvarez Y Sanchez vs. U. S., 216 U. S. 167.
Ex Parte Webb, 225 U. S. 663.
Rainy vs. U. S., 232 U. S. 310.
U. S. vs. Payne, 264 U. S. 446.

Obviously, the Treaty, if inconsistent with appellant's rights, is likewise inconsistent with this act of Congress and to the extent of such inconsistency is superseded by it.

Even though we are not sustained in either of our claims as to the construction of the Treaty, this Court must hold that as to such improvements as are authorized by this statute, we may collect tolls; hence, that the complaint states a cause of action for at least a portion, if not all, of the relief sought and it was therefore error for the lower court to sustain the judgment of dismissal.

VIII.

THE USE OF PIGEON RIVER IS NOW CONTROLLED BY THE ROOT-BRYCE TREATY OF 1909 WHICH IMPLIEDLY REPEALS THE WEBSTER-ASHBURTON TREATY IN SO FAR AS IT MAY APPLY TO PIGEON RIVER. THIS LATER TREATY PERMITS APPELLANT'S ACTS ALLEGED IN THE COMPLAINT.

A later treaty impliedly repeals a prior treaty save as to provisions not covered in the later one. As to such provisions, the earlier one still prevails.

Ross vs. McIntyre, 140 U. S. 453.

Where the later treaty covers the whole subject-matter it supersedes and impliedly repeals the former.

La Republique Francaise vs. Schultz, 57 Fed. 37.

This later treaty makes no mention of the use of various portages referred to in the prior treaty and therefore, as to the common use of such portages, there is no implied repeal.

It does, however, completely cover the subject of the use of boundary waters and therefore repeals the provisions of the prior treaty as to Pigeon River itself.

Its preamble recites that the two governments, "being equally desirous to prevent disputes regarding the use of boundary waters and to settle all questions which are now pending * * * involving the rights, obligations or interests of either in relation to the other, or to the inhabitants of the other, * * * have resolved to conclude a treaty in furtherance of these ends."

Article III consents to the continuance of "the uses, obstructions and diversions heretofore permitted," and contains a proviso that the treaty provisions "are not intended to limit or interfere with other government works for the benefit of commerce and navigation, provided that such works are wholly on its own side of the line. * * *"

Root-Bryce Treaty, 36 Stat. 2448.

CONCLUSION.

There may be room for differences of opinion in the decision of the various questions presented on this appeal. This is evident from such differences of opinion as have existed in and between the various courts of the United States and Canada before whom this and allied cases have come.

The conclusion is clear, however, that for purposes of this appeal Pigeon River must be assumed to be non-navigable and therefore a cause of action was stated for the recovery of appellant's reasonable charges for appellee's use of its improvements because (1) this does not offend against the Commerce Clause; (2) it has valid authorization of the state of Minnesota, and, at least in part, of act of Congress, and (3) it is not forbidden by any treaty provision.

There should therefore be a reversal.

Respectfully submitted,

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APPENDIX.

Minnesota Statute Authorizing Appellant's Acts.

Chapter 221, General Laws, Minnesota, 1889.

"An Act to Amend Title One (1) of Chapter Thirty-four (34) of the General Statutes One Thousand Eight Hundred and Seventy-eight (1878), Relation to Corporations.

"Be it enacted by the Legislature of the State of Minnesota:

"Section 1. That section one (1) of title one (1) of chapter thirty-four (34) of the general statutes of eighteen hundred and seventy-eight (1878) be and the same is hereby amended by inserting before the word 'navigation' in the fourth (4th) line of said section the words 'or other.'

"Sec. 2. That said title one (1) of chapter thirty-four (34) be further amended by adding thereto the following: Any corporation formed under this title in whole or in part for the improvement of any stream and driving logs therein, or for holding or handling logs therein which shall have taken prior possession of such stream, or any considerable portion thereof, upon which portion no other person or corporation has erected any dams or other improvements, and which may have need of improvement for that purpose, shall have power to improve such stream and its tributaries by clearing and straightening the channels thereof, closing sloughs, erecting sluice ways, booms of all kinds, side rolling, sluicing and flooding dams or otherwise if necessary, but shall in no case, in any manner, materially obstruct or impede navigation upon such stream or erect any dam or other obstruction below the head of steamboat navigation. Every such corporation which shall so improve a stream and so keep in repair, and operate its works so as to render driving logs thereon reasonably practicable and certain, may charge and collect reasonable and uniform tolls upon all logs, lumber and timber driven, sluiced or floated on the same, and may take possession of all logs put into such stream or upon rollways, so as to impede the drive when the owners thereof or their agents shall not have come upon the stream adequately provided with men, teams and tools for breaking the rollways and driving such logs in season for making a thorough drive down such stream without hindering the main drive; and shall also, at the request of the owner of any logs and timber put into said streams, take charge of the same, and drive the same down and out of such stream, or down such stream so far as their improvements may extend, and charge and collect therefor of the owner or party controlling said logs and timber, reasonable charges and expenses for such services. And such corporation shall for all such tolls costs and expenses have a lien on the logs for which same was incurred, and may seize, in whoever possession found, and hold a sufficient amount thereof to pay the same,

and make sale thereof upon giving ten (10) days' notice in the manner provided for notifying sales on execution upon the judgment of justice of the peace, or may enforce such liens as other liens are enforced by proper proceedings for that purpose, or may ask, demand, sue for, collect and receive from the owner or owners of such logs the amount due for any such tolls. No injunctional order shall be granted to prevent the use or enjoyment of any such improvement, or abate any such dam necessary thereto unless such corporation shall fail for sixty (60) days after judgment, from which no appeal has been taken, to pay any damages recovered for any injury done by or in consequence of its works. Any corporation formed for the improvement of a stream, which is in whole or in part a boundary between this and an adjoining state, and authorized to drive logs or maintain booms or dams in such stream, shall have authority to purchase and hold stock in a corporation or corporations in such adjoining state created for similar purposes upon the same stream, or to consolidate or otherwise unite with such corporation or corporations in such adjoining state, whenever the purposes for which the corporation in this state is organized can be better effected thereby. Provided, that no such purchase or consolidation or other union shall be made without the assent of holders of two-thirds (⅔) of the capital stock of such first (1st) named company. Provided, that all dams and other works erected under the authority given by this act shall be so constructed, used and operated as to facilitate and expedite the driving and handling logs and lumber upon the stream upon which the same may be erected, and the corporation making such improvements hereunder shall have no right to stop logs destined for points below its works on said stream except where dams have been constructed to accumulate water for sluicing logs and flushing the river below the same, and in such case shall not detain logs in any part of the river so as to form a jam or prevent the prompt delivery of logs destined for points below the works constructed under authority of this act.

"Sec. 3. The provisions of this act shall apply as well to corporations heretofore organized for the purposes specified in section two (2) of this act as to those hereafter organized for such purpose.

"Sec. 4. All acts and parts of acts in any manner conflicting with terms of this act are hereby repealed.

"Sec. 5. This act shall take effect and be in force from and after its passage."

(Approved April 24, 1889.)

Chapter 89, General Laws, Minnesota, 1905.

"An act to amend section 2 of chapter 221 of the General Laws of Minnesota for 1889, entitled 'An act to amend title one (1) of chapter thirty-four (34) of the General Statutes One Thousand Eight Hundred and Seventy-eight (1878), relating to corporations.'

"Be it enacted by the Legislature of the State of Minnesota:

"Section 1. That section 2 of chapter 221 of the General Laws of Minnesota for 1889 entitled 'An act to amend title one (1) of chapter thirty-four (34) of the General Statutes One Thousand Eight Hundred and Seventy-eight (1878), relating to corporations' is hereby amended so that the same shall read as follows:

"That said title one (1) of chapter thirty-four (34) be further amended by adding thereto the following: Any corporation formed under this title, in whole or in part, for the improvement of any stream or streams and driving or handling logs therein which shall have taken prior possession of such stream or streams, or any considerable portion thereof, upon which portion no other corporation organized for the purpose above mentioned has taken possession or has made improvements in aid of driving logs or of driving or handling therein, shall have power to improve such stream or streams and their tributaries by clearing and straightening the channels thereof, closing sloughs, erecting sluiceways, booms of all kinds, side rolling sluicing and flooding dams, or otherwise, as may be necessary; and may acquire any and all dams, booms, structures and works already erected by any person or persons, and also all necessary rights of way, shore rights, land and lands under water, by purchase or by any of the methods provided in this title; but such corporation shall in no case in any manner materially obstruct or impede steamboat navigation, or driving or handling logs.

"It shall be the duty of every such corporation to serve the public equally and reasonably, and for a reasonable compensation. Every such corporation which shall so improve a stream and so keep in repair and operate its works so as to render driving logs thereon reasonably practicable and certain, may charge and collect reasonable and uniform tolls upon all logs, lumber and timber driven, sluiced or floated on the same, and may take possession of all logs put into such stream or upon rollways, so as to impede the drive when the owners thereof or their agents shall not have come upon the stream adequately provided with men, teams and tools for breaking the rollways and driving such logs in season for making a thorough drive down such stream without hindering the main drive; and shall also, at the request of the owner of any logs and timber put into said stream, take charge of the same and drive the same down and out of such stream, or down such stream so far as their improvements may extend and charge and collect therefor of the owner or party controlling said logs and timber reasonable charges and expenses for such services. And such corporation shall for all such tolls, costs and expenses have a lien on the logs for

which the same was incurred, and may seize in whosoever possession found and hold a sufficient amount thereof, to pay the same, and make sale thereof upon giving ten (10) days' notice in the manner provided for notifying sales on execution upon the judgment of justice of the peace, or may enforce such liens as other liens are enforced by proper proceedings for that purpose, or may ask, demand, sue for, collect and receive from the owner or owners of such logs the amount due for any such tolls. No injunctional order shall be granted to prevent the use or enjoyment of any such improvement or abate any such dam necessary thereto, unless such corporation shall fail for sixty (60) days after judgment, from which no appeal has been taken, to pay any damages recovered for any injury done by or in consequence of its works. Any corporation formed for the improvement of a stream, which is in whole or in part a boundary between this and an adjoining state or country and authorized to drive logs or maintain booms or dams in such stream, shall have authority to purchase and hold stock in corporation or corporations in such adjoining state or country created for similar purposes upon the same stream, or to consolidate or otherwise unite with such corporation or corporations in such adjoining state or country, whenever the purposes for which the corporation in this state is organized can be better effected thereby. Provided, that no such purchase or consolidation or other union shall be made without the consent of holders of two-thirds (⅔) of the capital stock of such first (1st) named company. Provided, that all dams and other works erected under the authority given by this act shall be so constructed, used and operated as to facilitate and expedite the driving and handling logs and lumber upon the stream upon which the same may be erected, and the corporation making such improvements hereunder shall have no right to stop logs destined for points below its works on said stream except where dams have been constructed to accumulate water for sluicing logs and flushing the river below the same, and in such case shall not detain logs in any part of the river so as to form a jam or prevent the prompt delivery of logs destined for points below the works constructed under authority of this act.

"Sec. 2. Nothing in this act contained shall effect any action or proceeding now pending in any court of this state.

"Sec. 3. This act shall take effect and be in force from and after its passage."

(Approved March 29, 1905.)

Federal Authority Authorizing Appellant's Acts.

ACT, MARCH 3, 1901. 31 U. S. ST. AT LARGE, 1455.

"Chapter 878—An Act to authorize the Pigeon River Improvement, Slide & Boom Company, of Minnesota, to enter upon the Grand Portage Indian Reservation, and improve the Pigeon River in said State at what is known as the cascades of said river.

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Pigeon River Improvement, Slide & Boom Company, a corporation organized and existing under the laws of the State of Minnesota, be, and hereby is authorized, under such rules and regulations and subject to such conditions and limitations as the Secretary of the Interior may prescribe, to enter upon and improve the Pigeon River at what is known as the cascades of said river, for the purpose of making said river at said point navigable for floating logs, and to that end to enter upon the unallotted lands, and with the consent of the allottees upon any allotted lands, adjacent to said cascades, of the Grand Portage Indian Reservation, in said state, and to construct such sluice dams, wing dams, bulkheads, spill dams, and other works necessary for said purpose, and to take from said unallotted lands timber for the construction of said improvements and works in quantity not to exceed one hundred and twenty-five thousand feet, board measure, for which timber said company shall pay such price as may be agreed upon between said company and the Secretary of the Interior, but not less than five dollars per thousand feet, board measure, the proceeds to be placed in the Treasury of the United States to the credit of the Chippewa Indians in Minnesota; Provided, That said river after being so improved shall be open at all times to the free passage of all timber cut from said Grand Portage Indian Reservation, and to the passage of all other timber for a reasonable charge therefor; Provided further that suitable fishways shall be constructed and maintained by said company, to be approved by the United States Fish Commission."

(Approved March 3, 1901.)